United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1384

To be argued by
Ivan S. Fisher
and
John A. Ciampa

B/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Number 76-1384

UNITED STATES OF AMERICA,

Appellee,

—against—

FRANCISCO SALAZAR CADENA and
REV. ALBERTO MEJIAS, et al.,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS FRANCISCO SALAZAR CADENA AND REV. ALBERTO MEJIAS

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Introductory Statement

Francisco Salazar Cadena ("Salazar") and Reverend Alberto Mejias ("Mejias"), defendants in this case, appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, on July 30, 1976, after a trial before Honorable Robert L. Carter and jury, for unlawfully, intentionally and knowingly conspiring to manufacture, receive, buy, sell, distri-

bute and possess with intent to distribute various narcotic substances (cocaine and marijuana), in violation of Sections 812, 841(a)(1), 841 (b)(1)(A), 952(a), 955, 959, 960(a) and 960(b)(1) of Title 21, United States Code. In addition, Mejias was also adjudged guilty of unlawfully, wilfully and knowingly distributing and possessing with intent to distribute cocaine, in violation of 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A). Salazar and Mejias both were sentenced to 15 year terms of imprisonment.

Issues Presented for Review

(1) Whether the District Court erred in failing to suppress evidence seized by the joint Federal-State investigation, either in light of the State Court's prior suppression of this evidence, or on the merits;

(2) Whether the District Court erred in failing to dismiss the indictment for denial of appellants' right to speedy trial and due process, in light of the seventeen-month delay between initial state arrest and federal indictment;

(3) Whether the repeated misconduct by the prosecutor denied appellants a fundamentally fair trial;

(4) Whether the District Court erred in considering impermissible factors and failing to exercise individual discretion in determining the sentences meted out.*

Statement of the Case

Operation Banshee: Joint Federal-State Investigation

For many months prior to September 3, 1974, there was an ongoing investigation being carried out by a combined Federal-State task force of various law enforcement agencies, utilizing extensive wiretapping and surveillance, directed at an alleged conspiracy to illegally import and distribute narcotics, principally cocaine, from a source of supply in Colombia, South America.

This joint Federal-State task force, proceeding under the rubric "Operation Banshee", was recently noted by this Court and was observed on that occasion to have been "an intensive cooperative investigation by Federal and New York authorities." United States v. Armedo-Sarmiento, _____F.2d _____, Dkt. No. 76-1113 (2d Cir., October 28, 1976), at 307. As part of that collaborative effort, agents of the federal Drug Enforcement Agency (DEA) were closely involved with

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* In an effort to avoid presenting unnecessarily duplicative papers to this Court, Salazar and Mejias have briefed only what are believed to be the major errors affecting their convictions. Therefore, we join in those issues raised by the other appellants insofar as they may be applicable. Rule 28(i), Federal Rules of Appellate Procedure.

earlier State-initiated investigations that culminated in this and other indictments, and state police officers and prosecutors participated and assisted in the preparation of these subsequent federal indictments. Indeed, as Operation Banshee progressed, federal and state participants became so inextricably intertwined that some division of prosecutorial labor became increasingly necessary.

In order to facilitate the logistics of dividing up the prosecutions to be undertaken from this joint task-force's investigative efforts, federal and state prosecutors held a meeting on May 14, 1974, in order to coordinate their prosecutorial efforts. Representatives of the New York State Special Narcotics Prosecutor, United States Attorneys (Southern and Eastern Districts of New York), as well as DEA and New York City Police officials, were in attendance.

Among the points of agreement reached between state and federal officials were that the state would prosecute those defendants charged with substantive narcotics offenses as well as any related co-conspirators while the federal authorities would prosecute primarily those other conspirators the state chose not to prosecute. It was also agreed at that time that all arrests would take place on a coordinated basis between state and federal authorities.*

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* The District Court's finding with regard to the details of the coordinated activities of federal and state authorities are reported at United States v. Mejias, 417 F.Supp. 585, 593 (S.D.N.Y. 1976).

On September 19, 1974, a formal agreement was, in fact, entered into between federal and state authorities, designating those persons who would be prosecuted by the government and those to be prosecuted by the state. The memoranda embodying this agreement was submitted to the District Court below for in camera inspection. Despite repeated requests, the Court declined to disclose the contents of the memoranda to the defendants.

State Arrest and Prosecution

In late August, 1974, the Banshee participants made a command decision to "move in" on those whom it had under surveillance and considered to be traffickers and dealers. As a result, it was contemplated that search warrants were to be sought and arrests consummated.

These arrests occurred on September 3, 1974. Shortly after 5 p.m., Mejias, Salazar, and defendants Alba Luz Valenzuela and Francisco Padilla, were arrested in apartment 1B at 445 West 48th Street, New York City, where Mejias resided. The arrests, accomplished without a warrant, were carried out by a team of four officers, headed by Detective Vincent Palazotto of the New York City Police Department along with two Special Agents of the federal DEA and a New Jersey State Trooper.

Approximately five hours later, a search warrant, issued by state authorities, was brought to the apartment, and at that time, a search of the premises and defendants took place. During the intervening five hours between the defendants' arrest and the arrival of the search warrant, defendants were all held at the apartment in the custody of the arresting team. Shortly before midnight, the defendants were finally taken to 26 Federal Plaza.

Subsequently, the defendants, including Mejias and Salazar, were initially prosecuted via State indictments charging Class "A-1" felonies under New York law, carrying a term of 15 years to life imprisonment.

However, on September 24, 1975, New York State Supreme Court Justice Liston F. Coon granted defendants' motion to suppress all tangible evidence seized incident to their September 3, 1974 arrest. People v. Salazar, 83 Misc. 2d 922, 373 N.Y.S.2d 295 (Sup.Ct., N.Y.County, 1975). The basis for suppression, the court reasoned, was that the entry into Mejias' apartment was not to arrest and search, based upon "exigent circumstances" or probable cause, but rather, was clearly pretextual in nature. The State indictments only recently have been dismissed.

Federal Prosecution

Undaunted by their initial failure, the "Banshee" operatives chose to shop for a more "hospitable" forum at

which to peddle their tainted "fruit". As a result, the indictment in this case was filed in the Southern District of New York on February 19, 1976, five months after Justice Coon suppressed the evidence seized at the 48th Street apartment, and seventeen months after the defendants initially had been arrested and incarcerated on the original State charges.

The District Court below specifically found, as a factual matter, that the government's investigation and the grand jury consideration which preceded the filing of the instant indictment did not commence until after the completion of trial in United States v. Albert Bravo, 403 F.Supp. 297 (S.D.N.Y. 1975), a related "Banshee" operation, because inter alia, the government was informed by the New York State authorities that the various State prosecutions against the defendants in this action were severely jeopardized by the loss of the suppression motion in the State court, United States v. Mejias, 417 F.Supp. 585, 589 (S.D.N.Y. 1976).

The delay in bringing this federal indictment, however, had not impeded the government in the related Bravo case, supra, which was part of the same overall investigation and which turned upon interrelated facts and participants.

Indeed, on October 4, 1974, one month after the initial state arrest in this case, Indictment 74 Cr.939 was

filed in the United States District Court for the Southern District of New York. This indictment named twenty-nine defendants and identified as co-conspirators several of the defendants in this case, among them, Mejias, Mario (Evangelista) Navas and Estella Navas.

Subsequently, on April 30, 1975, Superseding Indictment S 75 Cr. 429 was filed in that case, also naming the defendants herein as among the co-conspirators.

The trial in that case, the so-called Bravo I, commenced before the Honorable John M. Cannella and jury in the United States District Court for the Southern District of New York on October 20, 1975, and concluded on January 23, 1976, with a jury verdict of guilty as to the twelve defendants on trial. That judgment was affirmed in part and reversed in part by this Court on October 28, 1976, United States v. Armedo-Sarmiento, supra.

As the District Court below found, the grand jury proceeding that resulted in the instant indictment did not commence until after the conclusion of the Bravo I trial, and it was candidly conceded that this investigation was begun because the government had been informed by the New York State authorities that the various State prosecutions against the defendants in this action were severely jeopardized by the loss of the suppression motion in the State Courts. Clearly, however, the government was previously

aware of the activities of the defendants in this case, having participated in the Operation Banshee investigation and arrest as well as already having named several of these defendants, Mejias among them, as co-conspirators in the earlier Bravo I indictments.

Pretrial Motions

Mejias and Salazar subsequently moved to suppress the evidence seized at their arrest on the basis of the State Court's prior determination that the arrest and illegal entry were pretextual in nature, and that, moreover, the State Court's findings on these Fourth Amendment questions were binding in this case. The Court below rejected their claims, finding adequate probable cause to effect the warrantless arrest of Mejias and break-in at his apartment. Furthermore, the Court below rejected any claim that the State Court's prior findings in this matter were in any way binding on the federal court. United States v. Mejias, 417 F.Supp. 598 (S.D.N.Y. 1976).

The District Court also rejected Mejias' and Salazar's motions to dismiss the indictments on the basis of the violation of their rights to due process and speedy trial by virtue of the government's unexplained seventeen-month delay in indicting them, after having already participated in the original investigation and arrest. The Court below held that such State arrest time was not chargeable

to the government in this case, and that, in any event, the government's investigation was independent of the State's arrest and detention* United States v. Mejias, 417 F.Supp. 585 (S.D.N.Y. 1976).

Trial and Sentence

Following a six-week trial, Salazar and Mejias were convicted under the first count of the indictment charging them with unlawfully, intentionally and knowingly conspiring to manufacture, receive, distribute and possess marijuana and cocaine. In addition, Mejias was also found guilty of an additional count of possession and distribution of cocaine.

In imposing sentence, the District Court sentenced every convicted defendant to across-the-board fifteen year terms of imprisonment, irrespective of their individual and varying degrees of involvement, and the unique personal circumstances of each of their lives and background.

In meting out such a severe, non-individualized sentence, the District Judge stated, on the record, that the sole motivation for such a sentence was that of deterrent impact among foreigners:

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* The District Court also rejected defendants' motion, pursuant to 18 U.S.C. §3164(b) and (c), for release following ninety days of continuous detention awaiting trial. United States v. Mejias, 417 F.Supp. 579 (S.D.N.Y.), aff'd sub nom. United States v. Martinez, 538 F.2d 921 (2d Cir. 1976).

"Let me make clear that the sentences I am going to give will probably be the most severe that I have ever given in my career, and I am going to do that and I don't want to sound like a jingoist but I am doing it because I think that people who come and deal in drugs and traffic and make profit on it from foreign countries coming into this country, that that is something that as a judge, when I have the opportunity to, I cannot tolerate." [Tr. 4216].

The Court below thereupon sentenced the defendants, all of whom were foreign-born, to the maximum fifteen-year penalty allowable under the law.

POINT ONE

THE MOTION TO SUPPRESS PHYSICAL EVIDENCE SHOULD HAVE BEEN GRANTED.

I. Introduction.

Appellants Salazar and Mejias, along with appellants Valenzuela and Padilla, timely moved in the District Court below for an order suppressing the physical evidence seized at Mejias' apartment on September 3, 1974. Because this seizure was the subject of a successful motion to suppress in the state court, People v. Salazar, 83 Misc.2d 922 (Sup.Ct. 1975), a host of issues are now presented for review. In the interest of clarity, therefore, we submit the following summary of the argument on this Point:

First, we contend that the dual-sovereignty doctrine, announced in Lanza v. United States, 260 U.S. 377 (1922), and reaffirmed in Abbate v. United States, 359 U.S. 187 (1959), has been so thoroughly eroded by subsequent decisions in the Supreme Court as to no longer correctly state the law, and that, therefore, the prior state court order suppressing this evidence should have collaterally-estopped the government from relitigating the Fourth Amendment issue raised below;

Second, even assuming that dual-sovereignty retains some vitality as a continuing principle of law, the facts of the present case demonstrate such a thorough and complete commingling of state and federal efforts, and unity of interest, both at the law enforcement and prosecutorial level, that the doctrine announced in Abbate does not apply in the present context;

Third, assuming that this Court is not prepared to hold on the record established in the District Court below that the state and federal governments, by their actions, waived any pretension of separateness, the Court should remand the case for a further development of the record because the District Court unfairly precluded the defendants from establishing the requisite degree of state-federal participation in each other's prosecution; and

Fourth, quite apart from the collateral-estoppel issue, the District Court should have granted the motion on the merits.

II. The Facts.

A. The State Court Proceedings: People v. Salazar, 83 Misc.2d 922 (Sup.Ct. 1975)

On September 3, 1974, an intensive investigation, including months of telephone wiretapping, reached its climax. Law enforcement authorities had focused upon appellant Mejias and others as participants in a widespread narcotics conspiracy, whose activities were centered at 327 West 30th Street, and 445 West 48th Street, in Manhattan. The 48th Street address was the home of appellant Mejias.

On the morning of September 3rd, the Special State Narcotics Prosecutor's Office began preparation for the submission of an application for a search warrant for these two addresses. Apparently, as a part of that preparation, groups of law enforcement officers were detailed for surveillance of the 30th and 48th Street apartments.* Among others, a Detective Palazzotto, of the New York City Police Department, was assigned to surveillance of Mejias' apartment on the morning of September 3, 1974. Although Mejias had previously been seen in the vicinity of the West 48th

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* At issue in the present case is the entry into Mejias' apartment on West 48th Street. For this reason, we shall exclude references to police activity with respect to the 30th Street address.

Street address by other law enforcement officers, Palazzatto did not make any personal observations of Mejias until later in the day. The State Court found that, as of 2:30 p.m. that afternoon, Palazzotto's sole instructions were to notify his superiors if he saw Mejias. At that time, he had no specific instructions to make an arrest. People v. Salazar, supra, 83 Misc.2d, at 925.

At approximately 3 o'clock in the afternoon, as preparations for the search warrant application continued, two targets of the narcotics investigation, Francisco Sarmiento ("El Mono") and Jose Ramirez, were arrested on a street in Queens. Apparently apprehensive that the arrests might have been observed by confederates, who would communicate with Mejias and others, those directing the investigation ordered the surveillance teams to "move in." The 30th Street surveillance team was thereupon directed forthwith to enter and secure the apartment.

Two hours later, at approximately 5 p. after observing Mejias and two others arrive at the 48[illegible] Street address in a taxicab, Detective Palazzotto was ordered to arrest Mejias "if he saw it fit," and thereupon to enter and secure Mejias' apartment on 48th Street. People v. Salazar, supra, 83 Misc.2d at 925-926.

The record before Justice Coon in state court revealed that after Palazzotto had observed Mejias enter

the apartment at approximately 5 p.m., the officers took a brief time to set up security measures.* Palazzotto, accompanied by other officers, then went to Mejias' apartment and knocked on the door. When Mejias opened the apartment door which was secured by a chain lock, Palazzotto announced his identity and his purpose. As Mejias retreated, Palazzotto, gun drawn, forced open the door and entered the apartment. Mejias, Salazar, and defendants Padilla and Valenzuela, were present. All were placed under arrest and frisked. On an open sofa bed in the vicinity of Padilla, Valenzuela and Salazar were several large stacks of money and a piece of cardboard with writing on it.

For the next five hours, the situation remained static, except that, at about 7 p.m., one of the officers began counting the money on the sofa bed. Shortly before

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* It was during this period that, according to the testimony in the District Court below, the police officers encountered the building superintendent who, according to the testimony, was a friend of Mejias and who was perceived by the officers to be in a position to warn Mejias of their presence. The record before Justice Coon discloses no such testimony with respect to an encounter with the superintendent or the fear that he might tip off the occupants of Mejias' apartment. This disparity is treated in greater detail, infra; it suffices for the moment to point out that the superintendent died between the conclusion of the state court proceedings and the commencement of the hearing below, and was therefore unavailable for testimony and cross-examination before Judge Carter.

midnight, other officers arrived with a search warrant for the apartment and began an extensive search of the premises. The search warrant application was found to have included, inter alia, references to the fact that the premises had already been secured.

In Justice Coon's view, the critical issue was whether "an interior area of a dwelling may be secured by the police and persons found therein detained -- and to what extent -- pending issuance of a search warrant." Id., at 928. Finding no directly applicable state law, Justice Coon relied upon federal authority, construing the actions of the arresting officers in light of Fourth Amendment requirements.

Focusing upon the manner of entry and the circumstances surrounding the entry, Justice Coon determined that no exigent circumstances justified the forceable entry into a private dwelling for the purpose of securing the persons and things found therein pending issuance of a search warrant. Finding that the arrest of Sarmiento and Ramirez was the only possible exigency, the court concluded that official fear that the persons inside the apartments would be warned was nothing more than idle speculation. The arrests occurred in Queens in the early afternoon, and there was no evidence whatever to suggest that the arrests had been observed by confederates. The Court, thus, found no reason-

able factual foundation on which to conclude that Mejias and others would be tipped off to police surveillance. Indeed, there was no evidence whatever which even remotely suggested that the arrestees were aware of the close surveillance at the apartments.

It is important to recognize that Justice Coon found, as a fact, that the purpose of the entry was not to arrest Mejias, but to "secure" the apartment and the occupants until a search warrant could be obtained. In concluding that such activity falls within the Fourth Amendment's proscription against unreasonable searches and seizures, and that, as a result, the discovery of money and documentary evidence was come at unlawfully, the Court was plainly correct.*

B. The Proceedings Below: United States v. Mejias, 417 F.Supp. 598 (S.D.N.Y. 1976).

Although recognizing the existence of the State Court's suppression order in People v. Salazar, supra, Judge Carter, apparently misconstruing the opinion, concluded that the state proceeding had been determined on the basis of state, rather than constitutional, law, and that it was, therefore, irrelevant to the proceedings before him. Conducting a de novo evidentiary hearing, the District Court concluded that exigent circumstances justified the warrantless entry into Mejias' apartment, the arrest of its occupants

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* The merits of the motion to suppress in this case are discussed in detail, at page 40-48, infra.

and the subsequent seizure of the objects found in plain view, as well as the evidence later seized pursuant to the search warrant issued five hours after the officers' arrival.

Appellants Salazar and Mejias, of course, contend that the Court was simply wrong as a matter of law in denying res judicata effect to the State Court determination.*

Putting aside, for the moment, the relative merits of this claim, it is critically important to juxtapose the findings of fact made by Justice Coon with the testimony adduced by the government below. A careful comparison raises the ugly specter of perjury and tailored testimony; it carries the unmistakable suggestion that, having unsuccessfully

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* The Court below relied upon United States v. Burke, 517 F.2d 377 (2d Cir. 1975), and United States v. Bedford, 519 F.2d 650 (3d Cir. 1975) for the proposition that the admissibility of evidence in a federal prosecution is a matter to be determined, independently, as a matter of federal law, without reliance upon any previous State Court determination. Although the issue of the extent to which a prior State Court adjudication of the merits of a motion to suppress is treated in detail, infra, it is important to note, at this juncture, that Burke and Bedford are wholly inapposite in this context. They concern whether a federal court, in determining a motion to suppress evidence obtained pursuant to a state search warrant, should apply federal or narrower state law. Of course, the validity of the search warrant issued by the state court is not in issue here; nor did Justice Coon deal with the bona fides of the warrant. Rather, the issue here is whether, and under what circumstances, a state court suppression determination in favor of a defendant precludes relitigation of factual issues in subsequent federal proceedings.

pressed a theory of exigent circumstances before the State Court, law enforcement officers "adjusted" the facts to provide the government with a new theory upon which to persuade a federal judge that their activities were perfectly lawful. While the subject of issue-preclusion is treated infra, we pause here briefly to note that this is among the very evils which the rule of collateral estoppel, and its related doctrines, were designed to prevent.

Thus, the state prosecutor argued before Justice Coon that the warrantless entry and arrests at Mejias' apartment were reasonable within the Fourth Amendment because, inter alia, the earlier Queens arrests had created an emergency situation requiring swift police action which could not abide a prior judicial determination of its appropriateness. The State Court, however, correctly found that the Queens arrests did not provide a sufficient predicate for a warrantless forcible entry.

The testimony in the District Court below, however, reveals that the government abandoned this theory. Instead, it provided a new set of facts with which to posit justification for the warrantless entry. Thus, DEA Special Agent James Forget, a member of the team of arresting officers, who did not testify before Justice Coon (H. 75), testified in the Court below that the decision to arrest Mejias did not occur

until after the encounter with the hostile building superintendent.*

According to the testimony of Agent Forget, and that of Detective Palozzotto, the officers encountered the building superintendent upon entering the premises for the purpose of establishing security measures in the event that Mejias or someone else attempted to flee. He, in turn, expressed resentment that the police were interested in Mejias, whom the superintendent believed to be a Catholic priest. According to the testimony below, it was this encounter with the superintendent which triggered the need for immediate police action.

Thus, in the proceedings before Judge Carter, Palozzotto testified, in substance, that the arrest of Sarmiento was not the event which prompted the decision to arrest Mejias; his State Court testimony was directly to the contrary. (H.534-538)

Having decided to arrest Mejias shortly after observing him exit the taxicab and enter the apartment building, on West 48th Street, Palazzotto and his brother officers entered the building and went to the roof for the purpost of determining whether there was a backdoor exit from Mejias' apartment. It was on the roof that Palazzotto and

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* Forget testified that he recalled having no conversation with anyone regarding this encounter until the Friday of the week preceding the hearing before Judge Carter. (H.134-135)

other officers encountered the recalcitrant superintendent. And it was shortly after Palazzotto's return from the roof, he now claims, that he advised fellow officers of his intention to arrest Mejias.

III. The Government Was Collaterally Estopped From Relitigating the State Court Suppression Order.

In United States ex rel. Di Giangiemo v. Regan, 528 F.2d 1262 (2d Cir. 1975), this Court held that the civil doctrine of issue-preclusion, or collateral estoppel, is available to criminal defendants to prevent the relitigation of Fourth Amendment issues decided in their favor.

In Di Giangiemo, petitioner was arrested shortly after he had been dropped off at his home from an automobile operated by one John Galante. Shortly thereafter, Galante himself was arrested and his automobile searched. The search disclosed a gun and jewelry in an attache case in the car. Burglar tools were found in the trunk of the car. Di Giangiemo and Galante were indicted in Queens County for receiving stolen property, and Di Giangiemo was also indicted in Nassau County for burglary and grand larceny. In the Queens County case Galante moved to suppress the jewelry and the gun on the grounds that the arrest had not been founded upon probable cause. The court agreed, and suppressed the evidence. The indictment thereupon was dismissed.

Di Giangiemo neglected to move to suppress in Nassau County and, thus, failed to set up the Queens County order as a bar to relitigation of the issues, a fact which ultimately led to this Court's affirmance of the denial of habeas corpus relief on grounds of waiver.

However, it is significant to note that, in opposition to Di Giangiemo's petition for state collateral relief, the officers who originally arrested Galante submitted affidavits alleging new facts not previously brought to the attention of the court in the original Queens County proceeding.* The original probable cause justification in Di Giangiemo was the officers' purported observation of Galante reaching toward an attache case in the rear of the car. In the later coram nobis proceedings, however, the same officers alleged, instead, that Galante had in fact alighted from his car with a drawn revolver -- a scenario apparently tailored to fit Adams v. Williams, 407 U.S. 143 (1972).

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* It is interesting to note that this Court, in Di Giangiemo, implicitly accepted the mutuality rationale announced by Justice Traynor in Bernhard v. Bank of America National Trust & Savings Association, 19 Cal.2d 807 (1942) in that Di Giangiemo himself was not a party to the original motion to suppress, and indeed, arguably had no standing. See United States v. Lisk, 522 F.2d 228 (7th Cir. 1975). The present case, of course, presents the other side of the mutuality coin.

Similarly, in this case, the hearing before Judge Carter developed allegations of critical facts nowhere alleged in the proceedings before Justice Coon. Thus, for example, in the state proceedings, the prosecutor unsuccessfully urged the theory of exigent circumstances based upon the earlier Queens arrest in order to justify the warrantless entry of Mejias' apartment.

In complete contrast, the government argued below that testimony concerning the encounter with the building superintendent -- never mentioned in the state proceedings -- provided the principal justification for the warrantless entry. But, as Judge Friendly pointed out in Di Giangiemo, "... relitigating that point is just what issue preclusion prevents..." United States ex rel. Di Giangiemo v. Regan, supra, 528 F.2d at 1266.

It is clear, furthermore, that the formal criteria for the invocation of collateral estoppel set forth in the Restatement of Judgments 2d, and adopted in Di Giangiemo, supra, 528 F.2d at 1265 -- "that the parties were fully heard, that the Court supported its decision with a reasoned opinion, [and] that the decision was subject to appeal or was in fact reviewed on appeal" -- are more than met in the

present case.*

There remains only the issue of whether the parties to the proceedings below were "the same" as the parties to the proceedings before Justice Coon. Of course, the nominal plaintiff in state proceedings is the People of the State of New York; the nominal plaintiff here is the United States of America.

It is submitted, however, that the "dual sovereignty" doctrine no longer retains vitality as a continuing principle of law, and that, therefore, the government was bound by Justice Coon's determination.

Alternatively, the representatives of the putatively distinct sovereigns, by their actions, displayed such a unity of interest that the one is estopped from relitigating issues determined adversely against the other.

Thirdly, to the extent that the record in this case fails to establish the requisite degree of privity between the government and the state, we request that the case be remanded for further proceedings in the District Court in order to amplify this issue on the ground that the District Court failed to give the defendants an adequate opportunity

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* This Court should take notice that the People filed a Notice of Appeal in People v. Salazar, supra, but never pursued an appeal by filing briefs or scheduling argument. Apparently, the appeal has now been abandoned in light of the recent dismissal of the indictments in People v. Salazar, supra. It is clear, however, that the opportunity, rather than the actual pursuit, of appeal is of controlling relevance.

to complete the record in this respect.

A. Dual Sovereignty: The Issue of Law.

In Abbate v. United States, 359 U.S. 187 (1959), the Supreme Court, reaffirming its position in United States v. Lanza, 260 U.S. 377 (1922), ruled that Abbate's federal conviction for conspiracy following his plea of guilty to related state charges was not barred by the double jeopardy clause of the Fifth Amendment. The Court focused upon Chief Justice Taft's famous formulation of the "dual sovereignty" doctrine in United States v. Lanza, supra, at 382:

> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guarantees in the first eight amendments, applies only to proceedings by the federal government,...and the double jeopardies therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority."*

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* It should be noted that both Abbate and Lanza rested upon primarily nineteenth century case authority, principally, Fox v. Ohio, 46 U.S. (5 How.) 410 (1847), United States v. Marigold, 50 U.S. (9 How.) 560 (1850), and Moore v. Illinois, 55 U.S. (14 How.) 13 (1852). In each of these cases it was assumed that the double jeopardy clause would not bar a second prosecution by either sovereign for an offense previously punished by the first; rather, the issue in these cases was whether by virtue of this fact the state statute was unconstitutional. Fox, Marigold, and Moore were, of course, all decided before the Civil War, at a time when state sovereignty was more than just a legal issue, having political and emotional overtones as well.

The resolution of the issue in Abbate thus turned upon an analysis focusing primarily upon the separate interests of the state and federal governments and upon a commitment to the idea that the protections of the Bill of Rights were not applicable to the states. In the 17 years since Abbate, however, the Court has moved away from this approach. The focus of its analysis in more recent cases involving federal-state relations has been directed at the rights of criminal defendants, and, ten years after Abbate, the Court expressly overruled Palko v. Connecticut, 302 U.S. 319 (1937), holding the Fifth Amendment's double jeopardy clause applicable to the States. Benton v. Maryland, 395 U.S. 784 (1969). Thus, although the Court has never expressly reconsidered the "dual sovereignty" doctrine of Abbate, subsequent cases have so thoroughly eviscerated its underlying rationale that Abbate can no longer be considered as stating the applicable law.*

Nor has the Abbate doctrine fared well among scholars and commentators. See, e.g., Note, Double Prosecution by State and Federal Governments: Another Exercise in Federalism, 80

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* In Waller v. Florida, 397 U.S. 387 (1970), while recognizing its decision in Abbate and the companion case, Bartkus v. Illinois, 359 U.S. 121 (1959), the Court held that the dual sovereignty doctrine manifestly did not apply to the states vis-a-vis their various political subdivisions.

Harvard L. Rev. 1538 (1967); Note, Double Jeopardy and Dual Sovereignty: The Impact of Benton v. Maryland upon Successive Prosecution For the Same Offense by State and Federal Governments, 46 Indiana L. J. 413 (1970); Fisher, Double Jeopardy, Two Sovereignties and the Intruding Conviction, 28 Univ. Chicago L. Rev. 591 (1961); Note, Dual Sovereignty and Double Jeopardy, 14 Western Reserve L. Rev. 700 (1963); Schaefer, Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe, 58 Calif. L. Rev. 391, 402 (1970).*

Indeed, whatever force remains to the doctrine has been further weakened by the fact that the State of New York, by legislative enactment, now regards itself bound by any prior federal adjudication in criminal cases; see, CPL §§ 40.10, 40.20, 40.30; Matter of Abraham v. Justices of New York Supreme Court, 37 N.Y.2d 560 (1975); People v. Dorf, 77 Misc. 2d 65 (Sup.Ct. 1974).

Moreover, in the wake of Abbate, then-Attorney General William P. Rogers announced, as a matter of Justice Department policy, that reprosecution in the federal courts after a state court judgment would be permitted only with the express approval of the Attorney General. United States v. Howrey, infra.

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* Among the most critical analyses of the dual sovereignty doctrine was set forth by Justice Black in his dissent in Bartkus v. Illinois, supra.

Finally, even Chief Justice Taft's formulation in Lanza, upon which Abbate relied, included the understanding that cases of multiple prosecution would be rare indeed. As Chief Justice Taft wrote:

> "It is almost certain that, in the benignant spirit in which the institutions both of state and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subject to a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, of where the public safety demanded extraordinary rigor." United States v. Lanza, supra, 260 U.S. at 383.

The erosion of tne Abbate doctrine began within a year of its announcement, and has continued ever since. In Elkins v. United States, 364 U.S. 206 (1960), Murphy v. Waterfront Commission, 378 U.S. 52 (1964), and Benton v. Maryland, supra, the Supreme Court faced a variety of problems involving the putatively separate interests of the state and federal governments, and in each instance, held either as a matter of its supervisory power over the federal courts (Elkins), or as a matter of constitutional principle (Murphy and Benton), that the rights secured criminal defendants under the Constitution must be given full effect, and that notwithstanding potential conflicting interests between putatively distinct sovereigns, the defendants' interests must prevail.

In Elkins v. United States, supra, the Court held evidence illegally obtained by state law enforcement officers

inadmissible at a federal criminal trial. This result is difficult to explain except in terms of a change in analytic focus from Abbate and Lanza.

Certainly, in Elkins, the Court could have held, as it had in Abbate and Lanza, that illegalities committed by state police officers should not be permitted to interfere with the enforcement of federal law. Cf. Abbate v. United States, supra, 359 U.S. at 195. Yet the Court expressly eschewed such an analysis, holding instead, as a matter within its supervisory jurisdiction, that the Fourth and Fourteenth Amendment rights of a defendant to be free from unreasonable searches and seizures must be vindicated.

It is striking to contrast the Court's posture in Abbate, namely that "if the states are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered," Id., 359 U.S. at 195, with its subsequent statement in Elkins:

> "Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is heartily promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in the federal trial,

there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation." Elkins v. United States, supra, 364 U.S. at 221-22.*

In 1964, in Murphy v. Waterfront Commission, supra, the Supreme Court ruled that a state may not constitutionally compel a witness to give testimony that might be used against him in federal criminal proceedings. Again, although an alternative analysis was available to it, the Court held firmly that the freedom from compulsory self-incrimination applied cross-jurisdictionally.

Finally, in holding that the reach of the Fifth Amendment protection against double jeopardy extended to the states, in Benton v. Maryland, supra, the Supreme Court thoroughly demolished the second of the two underlying supports of the Lanza - Abbate rationale.

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* It is true that Elkins suggests that federal courts must conduct a de novo evidentiary hearing on the reasonableness of state searches and seizures when the federal government seeks to take advantage of state activity. Elkins v. United States, supra, 364 U.S. at 223-224. However, Elkins was decided in 1960, one year before the Court, in Mapp v. Ohio, 367 U.S. 643 (1961), held that the exclusionary rule was directly applicable to the states, nine years before the Court, in Benton v. Maryland, supra, held that the protection of the double jeopardy clause applied to the states, and ten years before the Court, in Ashe v. Swenson, 397 U.S. 436 (1970), held that the civil doctrine of collateral estoppel was part and parcel of the Fifth Amendment protection against double jeopardy. Indeed, in light of the deference now accorded State Court suppression hearings and the determinations made by State Court Judges -- whose judgments may not now be reviewed on federal habeas corpus except in the most extraordinary of circumstances, see Stone v. Powell, ____U.S. ____, 44 U.S.L.W. 5313 (July 6, 1976), -- it seems particularly inappropriate to permit the government to relitigate in a federal forum that which an unsuccessful defendant may not relitigate in endeavoring to obtain federal review of his state court conviction.

Discussing the impact of Elkins and Murphy upon Abbate, one commentator has pointed out:

> It seems clear that by allowing an accused in one jurisdiction to assert rights based on the actions of another jurisdiction's officials in granting immunity or seizing evidence, these cases [Elkins and Murphy] seriously erode the doctrinal basis of ... Abbate. Three aspects of the court's reasoning in these cases are especially relevant ... First, in each case the majority examined the consequences of the practice in question from the defendant's point of view. The opinions recognized that the 'whipsaw' effect possible under the former rules defeated the purposes of the constitutional protection: 'To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer.' [Elkins v. United States, 364 U.S. at 215.] This recognition is, of course, consistent with the growing judicial tendency to give greater weight to individual interests than to institutional considerations. Second, the Court noted that the law enforcement efforts of the state and federal governments are not, in fact, separate and independent -- particularly in an 'age of cooperative federalism, where the federal and state governments are waging a united front against many types of criminal activity.' [Murphy v. Waterfront Commission, 378 U.S. at 55-56] It was recognized that although such free and open cooperation is generally desirable, the impact of combined federal-state law enforcement on an accused's constitutional rights cannot be ignored. Third, the possibility of friction between the state and federal governments was not allowed to prevent protection of the defendant's interests. As a result of Elkins, federal prosecutors may be handicapped by the illegal act of state officials over whom they have no control. .. Likewise, by forbidding the use of state-compelled testimony and its fruits in federal prosecu-

> tions, Murphy allows state action to impede federal law enforcement by possibly rendering broad areas of relevant information inadmissible. Note, Double Prosecution by State and Federal Governments: Another Exercise in Federalism, supra, 80 Harvard L. Rev. at 1546-47.

Thus far, although no lower federal court has held that Abbate has been overruled sub silentio, several have noted the erosion of its underlying rationale and have expressed a growing discomfiture with a rule, the justification of which has been so thoroughly eviscerated. See, e.g., Martin v. Rose, 481 F.2d 658, 660 n. 1 (6th Cir. 1973); United States v. Johnson, 516 F.2d 209, 212 n. 3 (8th Cir. 1975); United States v. Smith, 446 F.2d 200, 203 n. 1 (4th Cir. 1971). In United States v. Knight, 509 F.2d 354, (D.C. Cir. 1974), the D. C. Circuit took note of the disintegration of the doctrinal foundation of Abbate and wrote, in dictum, that, were the issue squarely presented, it would find Abbate no longer the applicable law:

> The Government asserts as being beyond question that ... appellants could ... have been tried by the state for robbery under a state statute and by the United States under the federal mail robbery statute. This court is of the view that even this long settled doctrine is of dubious vitality in view of Benton v. Maryland, supra. [395 U.S. 784 (1969)]. There is a serious question whether the doctrinal line from Fox [v. Ohio, supra] to Bartkus [v. Illinois, supra] has not been eroded by Murphy v. Waterfront Commission, 378 U.S. 52 (1964)...

> In Murphy the Court expressly overruled its decision in Feldman v. United States, 322 U.S. 487 (1944). Yet Feldman had been put in essence as a corollary of the proposition that the state and federal government are separate and independent sovereignties, and the Feldman opinion relied on the doctrine of Fox v. Ohio, supra, that there could be successive prosecutions for the same offense as violations of state law and of federal law.
>
> It is appreciated that the separate sovereignties doctrine of Fox was referred to and was not repudiated in Waller v. Florida, 397 U.S. 387 (1970). But it was limited in such a way as to override the doctrine of some 21 states treating municipalities and states as separate sovereigns for double jeopardy purposes. If there were successive prosecutions for what the Court considered to be the same conduct and offense, the Fox doctrine would have to be reconsidered. United States v. Knight, supra, 509 F.2d at 360.

Most recently, in United States v. Howery, ____ F.Supp. _____, Dkt. no. 74-567 (E.D.Pa., May 2, 1975), the District Court was faced with circumstances strikingly analogous to the instant case. In Howery, the defendant had been the subject of a joint state-federal investigation. He had successfully moved to suppress evidence seized from him in a state narcotics prosecution. Upon his subsequent prosecution by federal authorities, he sought to collaterally estop the government from relitigating the motion to suppress.

In a thoughtful opinion, Judge Becker ultimately held that the government was not collaterally estopped,

reaching a contrary conclusion on the law and on the facts. However, urging the Third Circuit to carefully reconsider the wisdom of the Abbate principle and subsequent cases questioning its continuing vitality as controlling authority, Judge Becker wrote:

> I very carefully considered the defendant's double jeopardy contention. In a normative sense, departing from my strong belief that, because judges should decide cases solely on the basis of the law, they should not express any normative judgments, I have expressed very frankly my view to counsel that the current state of the law bothers me. I think that at the very least when we are confronted with a situation wherein had Mr. Howery been acquitted in the federal court he could not have been convicted in the state court, [because Pennsylvania, like New York, prohibits reprosecution in its state courts after prosecution by any other jurisdiction] we must at least think very seriously about the wisdom of the Abbate principal. I confess that it takes me aback that an individual may be tried and acquitted in the state court and yet retried in the federal court. United States v. Howery, supra.

This Court has not yet reconsidered the Abbate doctrine in light of subsequent case law. See United States v. Beigel, 370 F.2d 751 (2d Cir. 1967), United States v. Feinberg, 383 F.2d 60 (1967), United States v. Panebianco, ____ F.2d ____, Dkt.no. 76-1132 (2d Cir., October 14, 1976) at 119. Nevertheless, this Court has never been averse to the reconsideration of outmoded and anachronistic doctrines in the light of new principles and changed perceptions of the law. See

United States v. Cioffi, 487 F.2d 492 (2d Cir. 1973); United States v. Mallah, 503 F.2d 971 (2d Cir. 1974); compare United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) with Frisbie v. Collins, 342 U.S. 519 (1952). Here, the current state of the law requires a thorough reexamination of the dual sovereignty doctrine and the rejection of this anachronistic conception of federalism.

B. Dual Sovereignty: The Factual Issue.

Quite apart from the question of whether the dual sovereignty doctrine retains any vitality as a continuing principle of law, there exists in this case another and further issue which revolves wholly about the facts. It is clear that collateral estoppel binds not just the nominal parties to litigation but also those so united in interest with the original parties that any distinction between them is more apparent than real. See, e.g., Watts v. Swiss Bank Corporation, 27 N.Y.2d 270 (1970); Good Health Dairy Products Corporation v. Emery, 275 N.Y. 14 (1937); Housman v. Touche, Ross & Company, ____ Misc.2d ____, N.Y.L.J., November 4, 1976, p.4, col.7 (Sup.Ct., N.Y.Co. 1976).

Here, the record displays a thorough commingling of federal-state law enforcement and prosecutorial efforts and a total unity of interest and purpose as between putatively distinct sovereignties. The notion of separateness, duality

and distinctiveness between the respective prosecuting authorities in this case, is but the sheerest of fictions, and, accordingly, this Court should hold that the government was bound by the suppression order granted in People v. Salazar, supra.

It is important to note that this is not a case where state law enforcement authorities merely make use of evidence gathered by federal counterparts (Ferina v. United States, 340 F.2d 837, 840 (8th Cir. 1965)), nor is this a case where federal authorities loan personnel and investigative resources to state authorities in need of assistance (United States v. Howery, supra).

This, rather, is a prosecution in which state and federal authorities joined hands at the highest level; a case in which information gleaned by the separate activities of state and federal agents were combined in a joint investigation; and most importantly, a case in which state and federal prosecutors cooperated in the selection of targets for prosecution, a forum for that prosecution, and in which a formal agreement was entered into by the respective parties and reduced to writing. This, in short, is a case in which the respective prosecutorial agencies, by their actions, waived any possible pretense of separateness of interest or purpose. There should have been permitted here, therefore,

only one prosecutorial bite at the proverbial apple.

The record below discloses the following facts:

On May 14, 1974, upon discovering that state and federal law enforcement authorities both were interested in the same individuals as targets of a probe into a Colombian-based narcotics conspiracy, representatives of the Special New York State Narcotics Prosecutor, United States Attorney (Southern and the Eastern Districts of New York), New York County District Attorney, Drug Enforcement Agency and New York City Police Department met to formulate plans and strategies for the investigation, arrest and ultimate prosecution of those individuals identified as participants in the cocaine smuggling ring. As a result of that meeting, agents of the Federal Drug Enforcement Administration were assigned to units within the New York City Police Department, and, indeed, ultimately participated in the arrest of the defendants.

The purpose of the May 14th conference was to coordinate investigative and prosecutorial efforts and to avoid duplicative prosecutions. Accordingly, as a result of this conference, it was agreed that certain individuals would be prosecuted by state authorities and others by the federal government. It was further agreed that the parties would coordinate their efforts and that the timing of any arrest

by federal authorities would be first cleared with state law enforcement officials. On September 19, 1974, the substance of this agreement was reduced to writing and formal agreement was reached with respect to the names of those individuals who would be prosecuted in state courts.* Included was appellant Alberto Mejias.

Beyond this, the record below is virtually barren of further direct evidence of federal involvement in the state prosecution. This, however, was the result of the Court's repeated refusal to accept evidence in this regard, in spite of defendants' proffer of the state court hearing minutes, which had developed this issue in somewhat greater detail. According to the testimony before Justice Coon, the federal government's role in the state proceedings was far from passive. The defense repeatedly offered to prove, inter alia, that the transcripts of the tape recordings made as part of the electronic surveillance, authorized by a State Supreme Court Justice, were kept in the United States Attorney's Office; that the federal government provided office space for the storage of evidence seized; and that, during the investiga-

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* The defendants repeatedly requested production of the agreement in the court below. The government resisted, claiming that the agreement included references to individuals not yet arrested or prosecuted and arguing that the revelation of the terms of the agreement might jeopardize pending investigations and/or prosecutions. Why the document could not have been redacted in appropriate fashion and disclosed is nowhere made clear in the record. In any event, the original agreement was submitted to the District Court in camera and is part of the record. A summary of the agreement was provided to the defendants.

tive phase of these proceedings, daily reports were made by New York City police officers to DEA headquarters. (H. 984-994) Yet, the District Court eschewed receipt in evidence of the State Court minutes, persisting in the position that what had transpired before Justice Coon was of no relevance to the matters before it.

Nevertheless, the District Court record fairly reflects a substantial degree of federal participation in the state proceedings. Having met on more than one occasion with their state counterparts, having agreed upon dividing up the investigation and prosecutions, and having reduced this agreement to a formal writing, it seems hardly likely that federal prosecutors thereupon withdrew their participation, and were, with respect to the State Court proceedings, mere passive spectators.

Rather, the inference is irresistible that the government, having invested its resources, manpower, and facilities into the investigative phase of the prosecution; having agreed to a distribution of defendants for prosecutorial purposes; and having, thus, a substantial stake in the outcome of the State Court suppression motion, took an active role in the management of its litigation. Thus, having united with state prosecutors to an extent which would bind a civil litigant under principles of collateral

estoppel, Housman v. Touche, Ross & Company, supra, Good Health Dairy Products Corporation v. Emery, supra, Watts v. Swiss Bank Corporation, supra, the government may not now claim that it is entitled to relitigate the issues previously resolved in Justice Coon's suppression order:

> It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from liability in debt. United States v. Oppenheimer, 242 U.S. 85, 87 (1916).

Alternatively, to the extent that the District Court record on this issue is incomplete, this Court should remand the case for further proceedings, in light of the District Court's repeated frustration of defense efforts to amplify the record.

IV. The Motion Should Have Been Granted on the Merits.

Notwithstanding whether Justice Coon's order precludes relitigation of the suppression motion in these proceedings, the District Court should have granted the motion on the merits. Even taken at face value,* the facts adduced

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* The record below discloses substantial discrepancies between the facts adduced before Justice Coon and those brought out before Judge Carter. Not surprisingly, the testimony below dovetails more neatly with the government's theory of the case than did the testimony adduced in State Supreme Court. These discrepancies and the inference of tailored testimony they raise are discussed supra, at 13-24.

below demonstrate that police officers forcibly entered a private dwelling without a warrant, in spite of ample time to obtain one and in the absence of any compelling need to do so.

Moreover, the record further establishes that although probable cause existed for the arrest of Mejias, the entry into his apartment was effected not for the purpose of his arrest, but, rather, for the constitutionally impermissible purpose of securing the apartment and seizing what was found in advance of any judicial determination that entry was warranted and a search justifiable.

The essential operative facts established below were these:

On September 3, 1974, after many months of intensive investigation, officers assigned to a joint state-federal drug enforcement enterprise closed in upon the targets of their investigation. That investigation included the earlier arrest, in January of 1974, of two co-conspirators who thereupon agreed to cooperate; controlled purchases of cocaine through these informants; wiretapping of the defendant Mario Navas' telephone; and the identification of Alberto Mejias, among others, as a co-conspirator.

It is significant that probable cause for Mejias' arrest developed no later than August 31, 1974, when he and

Navas were overheard discussing a cocaine sale on Navas' wiretapped telephone. Yet, no state or federal law enforcement official ever bothered to seek an arrest warrant for Mejias, or a search warrant for his apartment, until September 3rd.

On the morning of September 3rd, however, law enforcement agents suddenly determined to close the net. Surveillance was thenceforth established at Mejias' apartment on West 48th Street and in the vicinity of an apartment occupied by other co-conspirators on West 30th Street. Preparations were then made, under the aegis of an Assistant District Attorney, to apply for search warrants for these two addresses.

However, at approximately 2 p.m. in the afternoon, two other targets of this investigation, Ramirez and Sarmiento, ("Mono"), were arrested in Queens. Apparently fearful that these arrests might somehow alert Mejias and the others to the police surveillance, the decision was made to authorize Mejias' arrest. A New York City police detective on stakeout, Vincent Palazzotto, was thereupon directed to arrest Mejias, "if he saw fit".

Shortly thereafter, Palazzotto observed Mejias arrive and disembark from a taxi cab together with two in-

dividuals, subsequently identified as the defendants Valenzuela and Padilla.

After Mejias entered the apartment, Palazzotto decided that the time was right to arrest Mejias. Together with three other officers, including two federal DEA agents, he entered the building. Stationing one officer in the lobby, he went to the roof with the other two to determine whether there was a rear exit from Mejias' apartment.

While on the roof, he encountered the building superintendent, who expressed hostility concerning the officers' interest in Mejias, whom the superintendent believed to be a Catholic priest. After his return to the lobby, Palazzotto informed his fellow officers that he was going to arrest Mejias.

Having gained entry to the common hallway area, Palazzotto stood at Mejias' door, while another officer rang the outside buzzer. When Mejias opened the door the width of the chain securing it, Palazzotto identified himself, showed Mejias his detective shield, and informed Mejias that he was under arrest. When Mejias retreated from the doorway, ultimately disappearing from sight, the officer broke through the chain-lock, entered the apartment and arrested all the occupants. Seizing evidence

visible in plain view, and conducting a search of the premises for the existence of other persons, Palazzotto and his fellow officers held the defendants incommunicado, in violation of state law, CPL §140.40, for the next five and one-half hours, until a search warrant arrived.

The government argued below, and the District Court held, that this warrantless, forceable entry into a private dwelling was justified under the circumstances. Basing its opinion upon the police encounter with the building superintendent, and upon the fact that Mejias was an alien and thus "ha[d] a capability of instantaneous flight," 417 F.Supp. at 602, (although no evidence was presented to indicate Mejias was about to flee), the Court declined to reach the question whether a warrant is required prior to the forceable entry of a private dwelling. Instead, the Court held, in substance, that exigent circumstances justified the entry.

But there were no exigent circumstances except those manufactured by law enforcement officials. Probable cause for Mejias' arrest arose no later than August 31st, four days before the net was closed. Yet no one secured or applied for, an arrest warrant. More importantly, an examination of the affidavit in support of the search war-

rant ultimately issued on the evening of September 3rd, discloses that the vast bulk of factual information relied upon was possessed by law enforcement authorities at least 48 hours earlier.

Thus, here, the "exigency" of the circumstances must be viewed in light of the entire course of conduct ultimately resulting in the forceable entry to Mejias' apartment. As one court has put the matter:

> "When the emergency justification is advanced, for forceable entry into a private dwelling, we believe it is appropriate to appraise the agent's conduct during the entire period after they had a right to obtain the warrant and not merely from the moment when they knocked at the front door." United States v. Rosselli, 506 F.2d 627, 630 (7th Cir. 1974).

See also, Vale v. Louisiana, 399 U.S. 30, 40 (1970).

Viewed in this light, neither the rooftop encounter with the superintendent nor Mejias' retreat from his chain-locked door may properly be considered an "exigent circumstance" justifying forceable entry into a private dwelling.

In United States v. Rosselli, supra, the Seventh Circuit held unlawful an entry under even less compelling circumstances. In Rosselli, federal agents made a Sunday morning arrest of several individuals in an apartment at which a marijuana delivery had occurred. After arrest, the

marijuana deliveror disclosed he had made a delivery earlier that day, to another apartment.

Apparently fearing that one of the arrestees might tip off the recipient, the agents proceeded directly to the apartment, and knocked at the door. After identifying themselves, the agents heard a scuffling movement inside, the sound of a chain lock being engaged, a voice calling "Don't open the door for anybody," and quick steps running from the door to the rear of the apartment. The agents broke into the apartment, arrested the occupants and seized the marijuana found in plain view.

Rosselli stands in sharp relief against the facts in this case. In Rosselli, the agents did not have probable cause to believe marijuana was in the second apartment until the day they sought entry. Here, on the other hand, the activities of September 3rd were but the culmination of months of investigative activity, which had ripened into probable cause days before the arrests.

Yet, even under these less compelling circumstances, the Seventh Circuit held that neither the confederate's arrest nor the officers' observations when they knocked on the door justified the warrantless forceable entry. The Court wrote:

> We do not suggest that the emergency which did develop was contrived by the agents. They had a right to pursue their investigation by seeking voluntary cooperation from a suspect. But certainly the emergency which did ensue was forceable. Moreover, this type of situation may recur repeatedly and might lend itself to easing a bypass of the constitutional requirement that probable cause should generally be assessed by a neutral and detached magistrate before the citizen's privacy is invaded." United States v. Rosselli, supra, 506 F.2d at 630.

Moreover, as the First Circuit has put the matter:

> "Proceeding without a warrant is not to be justified, as the government suggests here, by the fact that by the time the officers act, dispatch is necessary to avoid flight or injury to person or property. Haste does not become necessary in the present sense if the need for it has been brought about by deliberate and unreasonable delay. This would allow the exception to swallow the principal." Niro v. United States, 388 F.2d 535, 540 (1st Cir. 1968).

See, also, United States v. Curran, 498 F.2d 30 (9th Cir. 1974), United States v. Mitchell, 525 F.2d 1275 (5th Cir. 1976), Commonwealth v. Forde, ____ N.E.2d ____, Mass. Advance Sheets at 1625, 17 CrL. 2269 (Sup. Jud. Ct. 1975).*

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* Compare, United States v. Mapp, 476 F.2d 67 (2d Cir. 1973) and United States v. Rubin, 474 F.2d 262 (3d Cir. 1973). In both cases, unlike the present case, the "exigencies" could not reasonably have been foreseen.

Similarly, here, the need for immediate police action must be understood in light of the failure of law enforcement officers to apply for a warrant when there was ample opportunity to do so. To permit Mejias' retreat from the chainlocked door to constitute "exigent circumstances" is to encourage bootstrapping of the worst sort. In light of the fact that there was no justifiable reason for the failure to obtain a warrant in advance as well as no indication of flight on the part of Mejias, the initial entry must be viewed as unlawful. Accordingly, that which was purportedly seized in plain view was unlawfully seized and should have been suppressed.

POINT TWO

APPELLANTS' RIGHT TO SPEEDY TRIAL AND DUE PROCESS WERE VIOLATED BY THE SEVENTEEN MONTH DELAY BETWEEN ARREST AND INDICTMENT

The purposeful and prejudicial seventeen month delay between the time of appellants' State arrest by the joint State-Federal task force, on September 3, 1974, and the federal indictment, returned on February 19, 1976, violated appellants' rights to a speedy trial under the Sixth Amendment and Rule 48(b), Federal Rules of Criminal Procedure, and the Due Process Clause of the Fifth Amendment. Under the unique

circumstances of this case, this seventeen month delay clearly must be charged against the government, in light of its intimate involvement in the joint state-federal investigation, apprehension and prosecution of appellants, and must result in dismissal of the indictment for unreasonable delay in indictment and trial.

This is a case which exemplifies the best and the worst aspects of cooperative federalism. In the instant proceeding, state and federal personnel joined forces at the law enforcement and prosecutorial levels in order to pool resources in a joint attack on the same group of individuals being investigated independently by each group.

Yet, having struck an agreement with the State to share manpower, facilities and intelligence in a collaborative effort, the government now seeks to hide behind a suddenly-raised facade of separateness from the State, thus endeavoring to have its cake as well as to eat it.

For the state prosecution backfired. The government, having voluntarily made the tactical choice to suffer appellants to be exposed to the draconian strictures of the State narcotics laws (mandating a maximum penalty of life imprisonment), saw its carefully-orchestrated scenario go down in flames. Months of investigation, thousands of man-

hours of work and tens of thousands of dollars all seemed to have gone for nought when the state court suppressed the evidence seized at appellants' arrest. Only then did the government decide to go forward and indict appellants.

Yet, the government would now have this Court believe, as it persuaded the Court below, that in spite of its thoroughgoing involvement in all phases of the state court proceedings,* the "federal" investigation into this case did not really commence, nor did the speedy trial period begin to run, until January, 1976.*

Among the government's disclaimers of any involvement in the state proceedings are allusions to the fact that the arresting officers, two of whom were federal agents, were under the nominal charge of a New York City police officer, the fact that the evidence was physically seized by New York City police pursuant to a state warrant, and the fact that the evidence was kept under the care, custody and control of the Special New York State Narcotics Prosecutor.

The Court below placed principal reliance upon the argument that:

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*This disingenuous disclaimer is, at best, risible. See Point One, supra, at 35-40 .

> "...the theory of dual sovereignty requires that the federal government can in no way be bound by the action of state prosecutorial authorities, absent a clear showing of federal intrusion into, and control over state decisionmaking processes. To hold otherwise would require that the government rush headlong into a federal prosecution whenever a defendant had been arrested on state charges as a result of federal participation in an ongoing investigation. United States v. Mejias, supra, 417 F.Supp. at 591.

As the foregoing makes abundantly clear, this analysis is wide of the mark. Whether or not the District Court is correct in its analysis of Abbate's implications begs the question. The record here more than rebuts the Court's assumptions, and, in any event, the Court below failed to provide appellants an opportunity to amplify the record at an evidentiary hearing regarding its assertions of joint state-federal involvement.*

The record below reflects that by the Spring of 1974, federal and state prosecuting authorities became aware that each was pursuing the same line of investigation against the same network of cocaine importation and distribution.

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*The substance of appellants' offer of proof, including the state court suppresion hearing minutes, is discussed supra, at 38-39.

On May 14, 1974, a meeting was held at which representatives of the Special New York State Narcotics Prosecutor, United States Attorneys (Southern and Eastern Districts of New York), DEA and New York City Police Department, met for the purposes of coordinating state and federal investigations and prosecutorial efforts. Among the primary purposes of the meeting was to avoid duplicative prosections.

The parties agreed, at that time, that law enforcement personnel of both offices would, in fact, coordinate activities and efforts. Certain DEA agents were assigned to units of the New York City Police Department. It was also agreed that the investigative efforts were to be coordinated and that no arrests would occur without prior approval of state officials.

Most importantly, however, the respective parties agreed to a division of prosecutorial labor with respect to the indictment and prosecution of specific defendants, the bulk of whom were to be taken by the state.

As a result of these continuing collaborative efforts, and in pursuit of their common objectives, on September 19, 1974, two weeks after the arrests in this case,

the respective state and federal representatives met again to reduce to writing their agreement with respect to the assignment of various defendants to various jurisdictions for prosecution.*

In spite of this compelling evidence of interlocking collaborative involvement between state and federal investigators--in prosecutions that could just as easily and swiftly have been brought in one jurisdiction as the other -- the government would now have this Court believe that an impenetrable Chinese Wall, in fact, existed -- cutting the government off from convenient access to the evidence needed to prosecute these defendants and making unreasonable the filing of the instant indictment until seventeen months after arrest. Such an argument strains credulity.

Indeed, in the Court below, appellants offered to prove an even greater degree of commingling of resources, intelligence and hard evidence. The defendants offered to prove, inter alia, that the transcripts of conversations,

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*The District Court conducted an in camera examination of this federal-state agreement, refusing the defendants access to it.

intercepted pursuant to electronic surveillance were stored in the United States Attorney's Offices that the government provided storage space for some of the evidence seized; and that New York City police officers made regular reports to DEA personnel.

The Court below, however, rejected this offer of proof, apparently under the misapprehension that the record developed in the state suppression proceedings -- long before the critical significance of state-federal collaboration was apparent to the prosecution -- was irrelevant to its determination.

Thus, on the facts, the conclusion is ineluctable that the government was able, if not willing and ready, to bring this prosecution at any time within the permissable ninety days after the arrest of these defendants. That the government made a tactical choice to defer to state authorities and, thus, voluntarily disabled itself from bringing this prosecution within the time limit set, generally, by the Sixth Amendment, specifically by the Southern District Interim Plan, may not now be permitted to inure to its benefit. To do otherwise would be to permit the government to reap the benefit of its own malfeasance.

The Interim Plan pursuant to the provisions of the Speedy Trial Act of 1974 for the Southern District of New York promulgated for use in the Court below pursuant to

Rule 50(b) of the Federal Rules of Criminal Procedure, provides, in pertinent part:

> "In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six months period under one or more of the exceptions in Rule 6, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise, the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days." Rule 5. All Cases: Trial Readiness and Effect of Non-Compliance.

It is beyond peradventure of doubt that the facts of this case bring it squarely within the mandate of this Rule. The date of arrest was September 3, 1974 and the date trial actually commenced was May 24, 1976, a delay of some twenty months. It flows ineluctably that, since the evidence needed to prosecute, as well as the physical

presence of appellants, were both easily within the government's reach, the time within which to try the defendants must be dated from the time of arrest -- an arrest in which the government did, after all, take an integral part.

Certainly, any claim by the government that sufficient evidence was "unavailable" to it at any time earlier than January, 1976, must be met with a certain amount of suspicion. Clearly, the government had at least enough evidence against Mejias to name him a coconspirator in overt acts in the earlier Bravo I indictment.

Were this violation of the Interim Plan the sole issue presented, it would still suffice to warrant reversal and dismissal of the indictment. However, even in the absence of an Interim Plan, and under far less egregious facts than those presented here courts have found violations of defendants' speedy trial rights. In United States v. Cabral, 475 F.2d 715 (1st Cir. 1973), the First Circuit considered almost precisely the same issue as that presented herein. In Cabral, state police arrested the defendant for possession of a stolen automobile, informing him that he was

also being arrested for unlawful possession of a shotgun, a collateral federal offense. Cabral was promptly arraigned in state court on the grand larceny charge, and, one month later, was transferred to a Connecticut prison for parole violation. Three days after Cabral's initial arrest, the seized shotgun was turned over to federal authorities. Curiously, however, he was not indicted on the federal charge until January, 1972, some fifteen months later, and was not, in fact, arraigned on the federal indictment until two months later.

In considering Cabral's claim that the fifteen-month period between his initial arrest by state officers and his federal indictment should be the period when his speedy trial term should be deemed to have been running, the First Circuit held that, not only was "the government's prosectuion...initiated...when...state authorities turned over the weapon to a federal officer," but, moreover, it should be deemed to have commenced "at the time of his initial arrest" three days earlier. Id. 475 F.2d at 718.

The Cabral court, thus, held that, for purposes of computing speedy trial delay, the federal prosecution was deemed commenced when the government came into possession of evidence sufficient to initiate the prosecution, particularly where, as in the present case, the arrest was

virtually contemporaneous with the receipt of evidence.*

In contradistinction to Cabral, this is not a case where, through administrative inadvertance, nonfeasance or excusable neglect, the government has failed to act timely to protect its interests.

Rather, this is a case which transcends mere technical violations of the local rules. It involves deliberate delay for strategic purposes best known to the government, which runs afoul of appellants' Fifth and Sixth Amendment rights to due process and speedy trial.

It is clear that an indictment may be dismissed under the Due Process Clause of the Fifth Amendment when there has been extensive preindictment delay where the defendant has either suffered actual prejudice in the conduct of his

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*Moreover, it may not seriously be claimed that the state and federal charges brought against Mejias and Salazar are not inextricably intertwined one with the other. As the Seventh Circuit held in United States v. DeTienne, 468 F.2d 151, 155 (7th Cir. 1972), cert.denied, 410 U.S. 911 (1973):

> "...if the crimes for which a defendant is ultimately prosecuted really only gild the charge underlying his initial arrest and the different accusational dates between them are not reasonably explicable,the initial arrest may well mark the speedy trial provisions applicability as to prosecution for all the interrelated offenses." Id. See also, United States v. Clark, 398 F.Supp. 341, 349 (E.D. Pa. 1975).

defense or been the victim of intentional prosecutorial delay designed either to harass him or to gain some tactical advantage. United States v. Marion, 404 U.S. 307 (1971); Dillingham v. United States, 423 U.S. 64 (1975); United States v. Gravitt, 523 F.2d 1211 (5th Cir. 1975), rehearing denied, 526 F.2d 378, 379 (5th Cir. 1976; see also, United States v. Finkelstein, 526 F.2d 517, (2d Cir. 1975); United States v. Frank, 520 F.2d 1287 (2d Cir. 1975, cert. denied, 423 U.S. 1087 (1976); United States v. Brown, 511 F.2d 920 (2d Cir. 1975); United States v. Iannelli, 461 F.2d 483 (2d Cir.), cert. denied, 409 U.S. 980 (1972); United States v. Ferrara, 458 F.2d 868 (2d Cir.), cert. denied, 408 U.S. 931 (1972); United States v. Stein, 456 F.2d 844 (2d Cir.), cert. denied, 408 U.S. 922 (1972).

The facts herein clearly demonstrate that prosecutorial delay was engineered for tactical reasons.

First, the government was allowed, in this case, two distinct opportunities to try the appellants, enabling it to defer indictment until after the state prosecution was completed. Thus, the government sat back, secure in the belief that if the state prosecution became jeopardized,

it could place the defendants in subsequent jeopardy, seemingly insulated from the Fifth Amendment prohibition.

Second, the government sought here to take advantage of the asymmetry of double jeopardy as between state and federal law. Had these defendants been prosecuted initially in the federal court, any federal judgment as to them would be binding, as a matter of state law, upon the state prosecutors. CPL §40.10, et seq. Cirillo v. Justices of the Supreme Court, 43 App. Div. 2d4 (2d Dept. 1973), aff'd., 34 NY 2d 990 (1974). However, an acquittal or other disposition favorable to defendants in state court would have no such preclusive effect upon federal reprosecution, if the government's reliance upon Abbate's continued vitality is correct. See, United States v. Panebianco, supra, slip opn. at 132.

In closely analogous circumstances, the District of Columbia Circuit held that nineteen month period delay occasioned by the government's deliberate forum-shopping could not be countenanced under the Sixth Amendment. In United States v. Lara, 520 F.2d 460 (D.C. Cir. 1975), the court affirmed the dismissal of a conspiracy indictment as to eight defendants on the ground that they had been denied their right to speedy trial.

The linchpin of Lara turned on the fact that

that where the government's decision to dismiss an indictment in one jurisdiction and to begin anew in another was dictated by tactics, not necessity, the nineteen month delay engendered was deemed unnecessary, unconscionable and that under the circumstances, the Court would presume prejudice from the length of the delay. The Court stated:

> "...[w]hen the Government's actions at any stage of the proceeding indicates bad faith, neglect, or a purpose to secure delay itself or some other procedural advantage, the resulting delay is not justified...[citation omitted]. We cannot tolerate long and unnecessary delay caused by the deliberate act of the government in seeking a supposed advantage." Id., 520 F.2d at 464.

Thus, in the instant case, as in Lara, the government chose to "bide its time" in order to allow a prosecution to be brought in a more favorable forum under more auspicious circumstances. This Court should hold, as did the D.C. Circuit, that the government must be held to that choice, and must be held accountable for its delay.

Alternatively, should the Court find that the present state of the record below has not allowed for sufficient development of the full extent of the federal-state collaboration already documented, the Court should remand for an evidentiary hearing at which these facts may be more fully developed. The Fifth Circuit has recently followed this course in Gravitt v. United States,

supra, where the district court, as in this case, failed to grant a requested evidentiary hearing, on similar claims of post arrest preindictment delay, occasioned by federal and state prosecutorial authorities.

POINT THREE

THE MISCONDUCT OF THE PROSECUTOR REQUIRES A NEW TRIAL

In an adversary system, it is inevitable that participants, from time to time, become contentious, and that the heat of the moment gives rise to occasional lapses in the normal protocol controlling the behavior of court and counsel. This is particularly true in a protracted criminal trial, where so much is at stake. But such departures from expected norms of conduct are rarely significant in terms of overall fairness of the proceedings, and for this reason, this Court is not often faced with legitimate claims of prosecutorial misconduct.

But the conduct of the government's representatives in this case went well beyond the bounds of propriety expected of officers of the court. This was a case marred not merely by an occasional isolated outburst of improper partisanship on the part of the Assistant United States

Attorney; this was a case rather, where the conduct of the prosecutor was so outrageous as to render this a trial by ambush, not by jury.

On fifty-two occasions during this six-week trial, the government attorney engaged in conduct which led the Court below to comment:

> "Gentlemen, I am not going to have any more of this bickering. Mr. Carey I have asked you and asked you and you persist -- persist -- in continually making speaking objections and disregarding what I have asked you to do. I think the time has come for you to stop that. I don't want to have to ask you again. You make speaking objections, you interrupt, you talk and so forth and just generate a lot of needless confusion in this case. I want it stopped. You can ask questions. I gave all of you time to ask as many questions as you want. I want it stopped. I don't want any further problems about it from you, or Mr. Ciampa or anyone else" (2541-42).

and

> "You are pressing too much, Mr. Carey" (4174).

and

> "Mr. Carey you are one of the most arrogant Assistant U. S. Attorneys that has ever been before me. I told you that I don't want to hear any more" (4176).

The prosecutor's transgressions, however, were not confined to the courtroom. The government attorney permitted himself to be interviewed by correspondants from the NBC television network about this very case and

the related case of United States v. Armedo-Sarmiento, supra, in connection with a program about the illegal importation and distribution of cocaine.

The television program, which included references to, and the display of, photographs of some of the defendants and prosecution exhibits, some of which were not yet in evidence, was aired during the middle of the trial (975). The jury was instructed not to watch the program (1336-38), but the Court below never conducted a voir dire of the jury in order to ascertain whether any jurors had either seen or heard about it. Instead, the Court told the jury (1348):

> "During the lull, ladies and gentlemen, about that program I told you not to see, I did see it and it was perfectly innocuous and it was so innocuous that it was merely a factual statement and no comment in the newspaper. I'm glad I told you not to see it but it couldn't possibly have influenced you."

The prosecutor's appearance in connection with a media event relating to a pending case is grossly improper. Rule 8 of the Criminal Rules of the United States District Court for the Southern District of New York provides, in pertinent part, that:

> "It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is

> associated, if there is a reasonable likelihood that such dissemination will interfere with the fair trial or otherwise prejudice the due administration of justice. Id.

Nor is the propriety of granting such an interview or releasing evidence for public inspection during the course of a criminal trial a novel question. As the Supreme Court pointed out in Shepard v. Maxwell, 384 U.S. 333, 362-63 (1966):

> "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jury, the trial courts must take strong measures to insure that the balance is never weighed against the accused...collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censorable and worthy of disciplinary measures." Id.

It is to be emphasized that the extent of the prosecutor's participation was not that of providing a mere press statement relating to the simple fact of arrest and name of defendant. Rather, this was a full-scale interview with a television correspondent broadcast on a network television program about the large-scale importation of cocaine into the United States.

This television program related directly the government's belief in the guilt of the defendants, dis-

playing to a national television audience photographs of alleged co-conspirators' exhibits which the government already had, or would, introduce at trial below. As Judge Lumbard noted:

> "The increasing concern with the possible damaging affects of prosecutorial statements which go beyond permissible limits is surely due in large part to the fact that today universal access to television cameras charges the memories of the viewers more forceably and indeliby than other means of mass communication." Martin v. Merola, 532 F.2d 191, 197 n.4 (2d Cir. 1976) (Lumbard, J. concurring)

One who holds prosecutorial office and "wields the instruments of justice wields the most terrible instrument of government," Id., at 196. The prosecutor here abused the prerogatives of his office by permitting himself to be interviewed in connection with a case in which the jury had not yet even begun to deliberate.

Were this indiscretion a single isolated instance of misconduct, it would be condemnable enough. But it does not stand alone. Throughout trial, the government's representative engaged in tactics requiring repeated objections and requests for rulings by defense counsel, and admonitions and reproach by the Court. The government

deliberately attempted to evade and subvert the officers of the Court.

At sentencing, the prosecutor, despite repeated admonitions by the Court, persisted in his efforts to vilify these defendants. While any one of these incidents considered in isolation might not be sufficiently egregious to require reversal, as a totality they represent a concatenation of misdeeds which deprived the defendants of a fundamentally fair trial. See, United States v. Alfonso-Perez, 535 F.2d 1362 (2d Cir. 1976).

Thus, for example, the government sought to offer into evidence several weapons, including a semi-automatic rifle seized at the apartment of a co-conspirator. The Court ruled it would not accept such evidence, in that its minimal probative value was more than outweighed by its prejudicial impact on the defendants (1188-92; 1207). In spite of the Court's clear instruction, the government sought, nevertheless, to circumvent the Court's ruling by offering a photograph of the same weapons. In defense of this wholly disengenuous tactic, the prosecutor argued, in part:

> The exhibits are offered to defense carefully sealing them from the jury, If in fact anything is disclosed to the jury, it was Mr. Jacobs because they were able to look over his shoulder and examine them also. They are not the guns themselves. If there is any prejudice with respect to the guns, these pictures of guns can be distinguished (1225-26).*

On numerous occasions, despite the Court's admonitions, the prosecutor persistently injected improper editorial comments in the course of making objections (see, e.g., 2517, 2536, 2541). Finally, after repeated warnings, the Court was compelled to admonish the prosecutor:

> Mr. Carey I have asked you and asked you and you persist -- persist -- in continually making objections and disregarding what I have asked you to do. You make speaking objections, you interrupt, you talk and so forth and you just generate a lot of needless confusion in this case...I want it stopped (2542).

In spite of this admonition, the prosecutor persisted and the court was again forced to direct him to desist.

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*This particular prosecutor's penchant for sophomoric distinctions of this sort has been noted previously by this Court. In United States v. Duvall, 537 F.2d 15 (2d Cir. 1976) this Court condemned the "pre-arraignment interview" of uncounseled defendants conducted by Assistant United States Attorneys. When asked in the district court whether an attorney had been present during his interview with the defendant in that case, this Assistant United States Attorney replied "Yes. Myself." United States v. Duvall, supra at 24.

Later, when counsel objected to the government's leading its own witness, the prosecutor responded, in the presence of the jury, in a manner as if to suggest his own integrity were on trial (3107-08).

Later, the prosecutor sought to read to the jury from an exhibit and thus sum up before completion of the presentation of evidence. The following colloquy ensued:

> MR. CAREY: I will now pass to the jury after I hold them both up, Exhibit 100-18 which was seized at 445 West 48th Street and pass to the jury government Exhibit 46 which was seized at West 30th Street.
>
> MR. SHAW: I really would ask for a side bar, your Honor.
>
> THE COURT: I don't need a side bar. I want to be clear so you don't have any problem, you are not going to read that piece of paper?
>
> MR. CAREY: Which exhibit?
>
> THE COURT: The exhibit that is on the lecturn, you are not to read from that piece of paper.
>
> MR. CAREY: Will your Honor do so?
>
> THE COUPT: Mr. Carey, this is clearly what you can do but I will permit you to do whenever you make your summatuion, but not now. That is all there is to it.
>
> MR. CAREY: I will pass to the jury government Exhibit 106 seized from the defendant Valenzuela on February 19, 1976.
> (3439-40).

Incredibly, in spite of the Court's abundantly plain ruling, the prosecutor persisted in attempting to read to the jury from exhibits. The following colloquy continued:

> MR. CAREY: The next exhibit I will show the jury is government Exhibit 101-B. That is a card seized from the defendant Salazar with a number on it, 45-3420, government Exhibit 405 in evidence, the telephone book of Oscar Perez and next to that number --
>
> MR. LIPSON: That was read before to the jury and this is nothing short of summation. This is the second time.
>
> THE COURT: I agree. You are not to do that sort of thing and don't do it again Mr. Carey.
>
> MR. CAREY: I am simply now --
>
> THE COURT: Don't do it again Mr. Carey, period.
>
> MR. CAREY: Your Honor permitted throughout the trial --
>
> THE COURT: Don't do it again, Mr. Carey, period. (3440).

Nor was this persistent course of conduct, bordering on if not actually crossing the line of contumacious, confined solely to the trial. At sentencing, the prosecutor launched into a long peroration focusing upon the defendants' nationality, charging that Colombian defendants are always reluctant to assist the government in apprehending other lawbreakers, an allegation nowhere supported by the evidence or the probation report. (4164-65).

Although the Court repeatedly directed the prosecutor to confine his remarks to appropriate subjects and to limit himself to correcting errors contained in the pre-sentence reports (4166), government counsel ignored the admonition and persisted in the same spirit of over-zealous partisanship which characterized his activities at trial. After repeated outbursts on the part of the government, the following colloquy ensued:

> THE COURT: I don't really need any further comments, Mr. Carey. I really don't.
>
> MR. CAREY: There are some things that have to be corrected. I request that the court give me an opportunity to do so.
>
> THE COURT: I have asked you to confine yourself to the corrections in the presentence report.
>
> MR. CAREY: I assume you are going to take into consideration Mr. Stockamer's (defense counsel's) comments and, therefore, he should also be corrected.
>
> THE COURT: I am going to take into consideration all the comments, but I don't -- you are pressing too much.
>
> MR. CAREY: Your Honor, this case deserves it, number one, because of the level of the crimes committed by these defendants. I am offering only --
>
> THE COURT: Mr. Carey, I have had enough. I don't want to hear any more from you other than to correct matters in the presentence report.
>
> MR. CAREY: Your Honor, what about --
>
> THE COURT: That is all I want to know. (4174-75).

Yet, the prosecutor persisted, and, finally, his patience stretched to the breaking point, Judge Carter stated:

> THE COURT: I have a report, these people have been on trial, I understand your feelings in the matter and the government's feelings in the matter. I am going to regard this with all my seriousness. Obviously I must. But I don't want any more speeches --
>
> MR. CAREY: I don't intend to make --
>
> THE COURT: From the government in this matter I don't want it.
>
> MR. CAREY: I am not going to make any speeches.
>
> THE COURT: This hearing is going on interminably. I don't want to hear anymore about your telling me about matters that have not come out in the trial and the matters which I am going to consider. I don't want to hear anymore.
>
> MR. CAREY: Mr. Stockamer (defense counsel) has raised matters which did not come up at the trial. They are matters which the government feels has a responsibility to reply to.
>
> THE COURT: You don't.
>
> MR. CAREY: I have the opportunity under Rule 32 of the Federal Rules of Criminal Procedure and I feel I have a responsibility.
>
> THE COURT: Mr. Carey, you are one of the most arrogant assistant United States attorneys that has ever been before me. I told you that I don't want to hear anymore.
> (4175-76).

A government' attorney is more than a partisan advocate and less than society's avenging angel. As the Supreme Court has written:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or that innocence suffer. He may prosecute with earnestness and vigor--indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger v. United States, 295 U.S. 78, 88 (1935).

Here, the prosecutor repeatedly and persistently engaged in conduct unworthy of his profession and demeaning to his special office. He abjured his responsibility as an officer of the court. He divulged information relating to a pending criminal prosecution to a television correspondent, jeopardizing the defendants' right to a fair trial free from adverse publicity. He ignored direct orders of the Court. He engaged in conduct requiring the court to admonish him repeatedly on the record. He was less an advocate and more a partisan zealot and by his conduct deprived the appellants a fair trial. Accordingly, their convictions must be reversed.

POINT FOUR

THE DISTRICT JUDGE CONSIDERED IMPERMISSIBLE FACTORS AND FAILED TO EXERCISE INDIVIDUAL DISCRETION IN METING OUT SENTENCES.

The sentencing judge's imposition of across-the board fifteen-year maximum sentences on all defendants, regardless of their relative degrees of criminal involvement and prior background, was a clear abuse of the Court's broad discretion in fixing punishment. This abuse of discretion manifested itself not merely in the fixed, mechanical sentences imposed, but in the references to the foreign origin of the defendants as a factor which weighed in the Court's consideration.

At the sentencing proceeding, after counsel addressed the Court and the defendants exercised their right of allocation, the District Judge made the following statement:

> Let me make clear that the sentences I am going to give will probably be the most severe that I have ever given in my career, and I am going to do that and I don't want to sound like a jingoist but I am doing it because I think that people who come and deal in drugs and traffic and make profit on it from foreign countries coming into this country, that is something that as a Judge, when I have the opportunity to, I cannot tolerate. (4216)

Despite extensive trial testimony, the District Judge disclaimed adequate knowledge of the various defendants' relative levels of participation (4217-4218), sentencing everyone to the maximum fifteen-year penalty.*

It is manifest that the use of a fixed mechanical approach as a substitute for exercising individualized judgment, or the intrusion of improper considerations into the sentencing process is a clear abuse of the Court's discretion. Williams v. Oklahoma, 358 U.S.576 (1959); Williams v. New York, 337 U.S.247 (1949).

While this Court does not ordinarily review the severity of sentences properly imposed within the statutory maximum, the Court has repeatedly vacated sentences based upon the sentencing judge's failure to properly exercise his discretion, by considering impermissible factors or adopting a fixed mechanical approach to a particular class of offenses or offenders. United States v. Stein, _____F.2d _____, Dkt. No. 76-1299 (2d Cir. October 22, 1976); United States v. Robin, _____F.2d_____, Dkt. No. 76-1033 (2d Cir. October 15, 1976); United States v. Schwarz, 500 F.2d

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* All defendants, save Salazar, received credit for approximately one and one-half year's pretrial incarceration.

1350, 1352 (2d Cir. 1974); United States v. Hartford, 489 F.2d 652, 655 (5th Cir. 1974); United States v. Baker, 487 F.2d 360 (2d Cir. 1973); United States v. Brown, 470 F.2d 285, 288 (2d Cir. 1972).

Here, the sentencing judge imposed severe penalties as an expression of abhorrence towards foreigners engaging in narcotics traffic in this country, stating that "...I am going to do that...when I have the opportunity..." (4216). The unintended implication of these ill-chosen remarks was to convey the impression that foreigners convicted of these crimes are to be, or, in the future shall be, treated more harshly than native Americans guilty of similar offenses. Such intemperate remarks suggest that defendants' national origin may have influenced the trial judge's considerations, a conclusion reinforced by the Court's gratuitous reference to appellant Padilla as the only authorized United States resident (4219).

Certainly, when a sentencing judge expresses the view that he has a "fixed sentencing policy based upon the category of crime rather than on the individualized record of the defendant," he has failed to exercise his discretion. United States v. Baker, supra, 487 F.2d at 362 (Lumbard, J. dissenting). Clearly, in such circumstances, this Court

has the power to review the sentence imposed. United States v. Brown, supra.

The sentencing court's statement that, when given the opportunity, he would impose such severe sentences in the future, carries the unmistakable suggestion of a fixed policy of maximum sentences, a policy which is clearly improper. Woosley v. United States, 478 F.2d 139 (8th Cir. 1973)(en banc); United States v. Schwarz, supra.

In this case the sentencing judge made no attempt whatever to individually differentiate between the various defendants' social backgrounds, family status, age, previous criminal record or rehabilitative prospects. The sole motivating criterion employed was that of retribution and deterrence -- deterrence, particularly, of the foreign-born. Consideration of such impermissible factors was a clear abuse of the sentencing judge's discretion warranting vacatur of the sentences in this case.

Accordingly, the sentences imposed should be vacated and the matter remanded for resentence. United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973); United States v. Stein, supra; United States v. Robin, supra; United States v. Schwarz, supra; United States v. Brown, supra.

CONCLUSION

For the reasons stated above, the judgment of of conviction should be reversed, and the indictment dismissed; alternatively, the judgment should be reversed and the matter remanded to the District Court for an evidentiary hearing or resentencing.

Dated: New York, New York
November 11, 1976

Respectfully submitted,

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